

The opinion in support of the decision being entered today was not written for publication and is not binding precedent of the Board.

Paper No. 34

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES**

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Ex parte HENDRIK M. HAAN

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Appeal No. 2004-2036  
Application No. 09/885,264

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ON BRIEF

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Before FRANKFORT, STAAB and BAHR, Administrative Patent Judges.  
BAHR, Administrative Patent Judge.

DECISION ON APPEAL

This is a decision on appeal from the examiner's final rejection of claims 1-3, which are all of the claims pending in this application.

We AFFIRM-IN-PART and enter a new ground of rejection.

BACKGROUND

The appellant's invention relates to a device for use in a toilet for emitting a jet of water to remove any remnants after intestinal evacuation (specification, pages 1 and 3). The device includes a dual outlet valve threaded onto the toilet's main water supply,

one outlet leading to a line to the toilet tank and the other leading to a water line terminating in a discharge spout pointing upward from the rear of the toilet bowl. A copy of the claims under appeal is set forth in the appendix to the examiner's answer (Paper No. 32).

The examiner relied upon the following prior art references in rejecting the appealed claims:

Rius	4,181,985	Jan. 8, 1980
Barker	4,995,121	Feb. 26, 1991
Moon	5,946,741	Sep. 7, 1999

The following rejections are before us for review.

Claims 1 and 3 stand rejected under 35 U.S.C. § 103 as being unpatentable over Rius.

Claim 2 stands rejected under 35 U.S.C. § 103 as being unpatentable over Moon in view of Barker.

Rather than reiterate the conflicting viewpoints advanced by the examiner and the appellant regarding the above-noted rejections, we make reference to the answer (Paper No. 32) for the examiner's complete reasoning in support of the rejections and to the brief (Paper No. 31) for the appellant's arguments thereagainst.

### OPINION

In reaching our decision in this appeal, we have given careful consideration to the appellant's specification and claims, to the applied prior art references, and to the respective positions articulated by the appellant and the examiner. As a consequence of our review, we make the determinations which follow.

Claim 1 is directed to a system “to dislodge and remove all remnants left behind on and around the colon exit after intestinal evacuation, while seating on the toilet.” Rius discloses a spray attachment to a toilet bowl which directs a “jet of water” (column 2, line 2) against the user’s lower excretory surfaces when seated on the toilet. Rius teaches that the disclosed attachment is valuable for “thoroughly cleaning the anus of hemorrhoid sufferers and serves as a bidet for the vulvo-vaginal areas” (column 2, lines 25-27). In light of this teaching of thorough cleaning of the anus, one of ordinary skill in the art would certainly have understood the Rius attachment to dislodge and remove all remnants left behind on and around the colon exit after intestinal evacuation, as called for in claim 1.

Appellant’s arguments that the examiner has not appreciated that appellant’s device keeps “the user dry” and can be brought to the market for under \$50 (brief, page 9) and the arguments on page 10 of appellant’s brief are directed to features which are not recited in claim 1 and thus are not relevant to the issue of the patentability of claim

1 over Rius. It is well established that limitations not appearing in the claims cannot be relied upon for patentability. In re Self, 671 F.2d 1344, 1348, 213 USPQ 1, 5 (CCPA 1982).

We note that the examiner has not pointed out any differences between the subject matter of claim 1 and Rius or proposed modification of Rius to arrive at the claimed subject matter as the Manual of Patent Examining Procedure (MPEP) Section 706.02(j) instructs examiners to do when making rejections under 35 U.S.C. § 103. The examiner's position thus appears to be that claim 1 is unpatentable because the subject matter thereof is anticipated<sup>1</sup> by Rius. For the reasons discussed above, we likewise come to this conclusion. A disclosure that anticipates under 35 U.S.C. § 102 also renders the claim unpatentable under 35 U.S.C. § 103, for "anticipation is the epitome of obviousness." Jones v. Hardy, 727 F.2d 1524, 1529, 220 USPQ 1021, 1025 (Fed. Cir. 1984). See also In re Fracalossi, 681 F.2d 792, 794, 215 USPQ 569, 571 (CCPA 1982); In re Pearson, 494 F.2d 1399, 1402, 181 USPQ 641, 644 (CCPA 1974). Thus, we sustain the examiner's rejection of appealed claim 1 under 35 U.S.C. § 103.

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<sup>1</sup> Anticipation is established only when a single prior art reference discloses, expressly or under the principles of inherency, each and every element of a claimed invention. RCA Corp. v. Applied Digital Data Sys., Inc., 730 F.2d 1440, 1444, 221 USPQ 385, 388 (Fed. Cir. 1984). In other words, there must be no difference between the claimed invention and the reference disclosure, as viewed by a person of ordinary skill in the field of the invention. Scripps Clinic & Research Found. v. Genentech Inc., 927 F.2d 1565, 1576, 18 USPQ2d 1001, 1010 (Fed. Cir. 1991). It is not necessary that the reference teach what the subject application teaches, but only that the claim read on something disclosed in the reference, i.e., that all of the limitations in the claim be found in or fully met by the reference. Kalman v. Kimberly Clark Corp., 713 F.2d 760, 772, 218 USPQ 781, 789 (Fed. Cir. 1983), cert. denied, 465 U.S. 1026 (1984).

We shall not, however, sustain the examiner's rejections of claim 2 as being unpatentable over Moon in view of Barker and claim 3 as being unpatentable over Rius. For the reasons expressed below in our new ground of rejection, these claims are indefinite. Therefore, the prior art rejections must fall because they are necessarily based on speculative assumption as to the meaning of the claims. See In re Steele, 305 F.2d 859, 862-63, 134 USPQ 292, 295 (CCPA 1962). It should be understood, however, that our decision in this regard is based solely on the indefiniteness of the claimed subject matter, and does not reflect on the adequacy of the prior art evidence applied in support of the rejections.

#### NEW GROUND OF REJECTION

Pursuant to 37 CFR § 41.50(b), we enter the following new ground of rejection.

Claims 2 and 3 are rejected under 35 U.S.C. § 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim appellant's invention.

The legal standard for definiteness is whether a claim reasonably apprises those of skill in the art of its scope. See In re Warmerdam, 33 F.3d 1354, 1361, 31 USPQ2d 1754, 1759 (Fed. Cir. 1994).

The scope of appellant's claims 2 and 3 is unclear. In order to understand the scope of these claims, one must at the outset be able to ascertain whether they are directed to processes or to articles of manufacture, compositions of matter or machines. Neither claim 2 nor claim 3 is directed to an article of manufacture, composition of

matter or machine and claim 2, while perhaps attempting to recite a process of using the "Water-Wipe" system, does not positively recite a process comprising process steps and is thus not clearly a process claim. Rather, both claims appear to be directed to pointing out advantages of appellant's "Water-Wipe" system. Moreover, the reference to "the Water-Wipe system" in claims 2 and 3 further confuses the scope of the claims because, inasmuch as "Water-Wipe system" is not a recognized term of art, one of ordinary skill in the art would not be able to determine with any certainty which, if any, of the details of appellant's disclosure are incorporated into claims 2 and 3 by the use of this terminology in the claims.

#### CONCLUSION

To summarize, the decision of the examiner to reject claim 1 under 35 U.S.C. § 103 is affirmed, but the decision to reject claims 2 and 3 under 35 U.S.C. § 103 is reversed.

Regarding the affirmed rejection(s), 37 CFR § 41.52(a)(1) provides "[a]ppellant may file a single request for rehearing within two months from the date of the original decision of the Board."

In addition to affirming the examiner's rejection(s) of one or more claims, this decision contains a new ground of rejection pursuant to 37 CFR § 41.50(b) (effective September 13, 2004, 69 Fed. Reg. 49960 (August 12, 2004), 1286 Off. Gaz. Pat. Office

21 (September 7, 2004)). 37 CFR § 41.50(b) provides "[a] new ground of rejection pursuant to this paragraph shall not be considered final for judicial review."

37 CFR § 41.50(b) also provides that the appellant, WITHIN TWO MONTHS FROM THE DATE OF THE DECISION, must exercise one of the following two options with respect to the new ground of rejection to avoid termination of the appeal as to the rejected claims:

(1) *Reopen prosecution*. Submit an appropriate amendment of the claims so rejected or new evidence relating to the claims so rejected, or both, and have the matter reconsidered by the examiner, in which event the proceeding will be remanded to the examiner. . . .

(2) *Request rehearing*. Request that the proceeding be reheard under § 41.52 by the Board upon the same record. . . .

Should the appellant elect to prosecute further before the examiner pursuant to 37 CFR § 41.50(b)(1), in order to preserve the right to seek review under 35 U.S.C. §§ 141 or 145 with respect to the affirmed rejection, the effective date of the affirmance is deferred until conclusion of the prosecution before the examiner unless, as a mere incident to the limited prosecution, the affirmed rejection is overcome.

If the appellant elects prosecution before the examiner and this does not result in allowance of the application, abandonment or a second appeal, this case should be returned to the Board of Patent Appeals and Interferences for final action on the affirmed rejection, including any timely request for rehearing thereof.

No time period for taking any subsequent action in connection with this appeal  
may be extended under 37 CFR § 1.136(a).

AFFIRMED-IN-PART; 37 CFR § 41.50(b)

CHARLES E. FRANKFORT  
Administrative Patent Judge

LAWRENCE J. STAAB  
Administrative Patent Judge

JENNIFER D. BAHR  
Administrative Patent Judge

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